IN THE

Supreme Court of the United States

No. 70-46

UNITED STATES OF AMERICA,

Petitioner,

v.

DIMAS CAMPOS-SERRANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Court of Appeals as set forth in the Appendix is deficient, for it omits a substantial portion of the Opinion. (App. 124) The respondent would suggest the use of the copy of the Opinion in the Petition for Writ of Certiorari and as officially reported at 430 F.2d 173.

JURISDICTION

The respondent raises no question as to the proeedural aspects of jurisdiction, but exercises the right to challenge the jurisdiction of the District Court insofar as it held that an alien registration receipt card was a document required for entry under 18 U.S.C. 1546.

STATUTE INVOLVED

The statute involved, 18 U.S.C. 1546 first paragraph, states:

> Whoever, knowingly forges, counterfeits, alters or falsely makes any immigrant or nonimmigrant visa, permits, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; . . . shall be fined not more than $2,000 or imprisoned not more than five years, or both." 66 Stat. 275 (1952).

QUESTIONS PRESENTED

1. Was the Federal agent's interrogation and demand for incriminating evidence from a suspected alien immune from the Fifth Amendment privilege against self-incrimination because of the "required records" doctrine?

2. Did the circumstances surrounding the interrogation of this alien suspect create a coercive atmosphere requiring Federal agents to give a *Miranda* warning?

3. Is the alien registration receipt card a "document required for entry into the United States" under 18 U.S.C. 1546 so as to give jurisdiction over the subject matter?

4. Was the respondent prejudiced at trial by a violation of the Fourth Amendment right against unlawful search and seizure, a Sixth Amendment denial of confrontation of the witnesses against him, and denial of the Fifth and Sixth Amendment right to funds to secure the attendance of necessary and material witnesses?[1]

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[1] Such arguments are urged in support of the judgment of the Court of Appeals. *United States v. Ballard*, 322 U.S. 78, 88 (1944); Stern and Gressman, *Supreme Court Practice* 314-315 (4th ed. 1969).

SUPPLEMENTAL STATEMENT

The Immigration and Naturalization Service (hereinafter INS) investigators on the morning of 19 November 1968 were conducting a task force arrest in search of aliens unlawfully in the United States. (App. 19, 40) Although the preparation for the task force arrest was made a day in advance (App. 19), the agents did not have an arrest warrant for Miguel Rico (App. 22) or Dimas Campos-Serrano (App. 42), and the INS investigators did not have a search warrant to search the apartment. (App. 42)

Upon the second entry of the investigators White and Burrow into the apartment, while accompanying their prisioner Rodriguez-Ortiz to obtain his clothing, this prisoner produced a key and opened the door. Investigator Burrow did not recall whether or not this prisoner had a key or whether he knocked upon the door to gain entry. (App. 48) Investigator Burrow did testify that this prisoner, Rodriguez-Ortiz, did not ever expressly consent to the entry of Investigator White or himself. (App. 53)

Investigator Burrow said he thought that since the prisoner Rodriguez-Ortiz had an altered alien registration receipt card, that there was a possibility that Mr. Campos' card also was altered. Prior to asking the defendant to produce this card for the second time, the INS agent did not advise him of his rights. (App. 49)

Prior to trial the defendant through counsel moved to dismiss the indictment for failure to state an offense and the improper application of the statute (18 U.S.C. 1546) to the Alien Registration Receipt Card (Form I-151). (App. 10-12) This motion was denied. (App. 3) The motion to dismiss was renewed with a motion for judgment of acquittal, but there was a finding of guilty. (App. 112-114).

At trial, the Government introduced the Immigration file of Diana Gloria Vargas-Garcia with the registration number of A14 713 099 which contained an application for a new alien registration receipt card and a statement that the card

had been stolen, which had been submitted and signed by Miss Vargas-Garcia. (App. 120-121). The defense objected to the introduction of the exhibit because there was no foundation, it constituted gross hearsay, and it denied the defendant his right of confrontation of the witnesses against him under the Sixth Amendment. (App. 111-112) Although there was no showing by the Government that the witness Diana Gloria Vargas-Garcia was unavailable (App. 111), the trial court received the exhibit into evidence. (App. 112).

ARGUMENT

INTRODUCTION AND SUMMARY

I

An alien is protected under the Fifth Amendment. The circumstances surrounding the demand for the altered card revealed that the defendant incriminated himself not only by the card itself, but by his production of it and his comments concerning this card. The factual circumstances and general rule announced in *Boyd v. United States*, 116 U.S. 616 (1886), indicate that the privilege should protect the defendant (respondent). The decision in *Wilson v. United States*, 221 U.S. 361 (1911), is limited to corporate records and one who holds records only in a representative capacity. *Davis v. United States*, 328 U.S. 582 (1946), is limited to a business setting and should not be applied to a compelled production of evidence from the defendant at his residence. The "required records" doctrine was formulated in *Shapiro v. United States*, 335 U.S. 1, 17 (1948), but it was limited to business records. In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), this Court held that a selective group inherently suspect of criminal activities could assert the privilege against self-incrimination in defense of an administrative order to register. The "required records" doctrine was refined in *Marchetti v. United States*, 390 U.S. 39 (1968), which enumerated the three elements necessary for the application of the *Shapiro* doctrine, but these ele-

ments are not present with respect to the defendant's possession of the alien registration receipt card. The third requirement especially was absent because the defendant was within a selective group, i.e. an individual, that was inherently suspect of criminal activities, i.e. possession of an altered alien registration receipt card.

II

The circumstances surrounding the interrogation of this alien suspect were similar to those in *Orozco v. Texas*, 394 U.S. 324 (1964), and required the giving of a *Miranda* warning. This alien suspect who could not speak English witnessed his roommates as prisoners of the INS agents who interrogated him. The disparity in position and the questionable status of the INS agents in the apartment created a coercive atmosphere and deprived the defendant of his freedom in a significant way.

III

The alien registration receipt card is not a "document required for entry into the United States" (18 U.S.C. 1546), for it is evidence of registration after the defendant has gained entry into the United States, and the ancillary provision permitting *reentry* after a temporary absence does not change the essential characterization of the card. Another statutory provision of the Immigration and Nationality Act of 1952 (8 U.S.C. 1306(d)) reveals an inconsistency that Congress could not have intended. The defendant was guilty of no more than a misdemeanor (8 U.S.C. 1325), which construction is favored under the principle of lenity. This construction would also give effect to each section of the Immigration and Nationality Act of 1952 and would be consistent with the administrative regulations that treat this card only as *evidence* of registration, not a document required for registration.

IV

The interrogation of the defendant and the products of that interrogation were also the result of an unlawful search and seizure in violation of the Fourth Amendment, for the agents went beyond the scope of the permissible entry, if any, in demanding the production of the defendant's card upon the second entry into his apartment. The introduction into evidence of an Immigration file with Miss Vargas-Garcia's statement was inadmissible hearsay and denied the defendant the right to confront the witnesses against him under the Sixth Amendment. No showing of the unavailability of the witness was made, and the Government failed to satisfy even the most minimal requirements for a hearsay exception. The failure to provide funds to secure the possible attendance of the two prisoners concerning the issue of consent to the entry of the INS agents was a denial of due process under the Fifth Amendment. The defendant's right to counsel under the Sixth Amendment was prejudiced by the delay in bringing the defendant before the court for appointment of counsel, who was not able to interview these two witnesses prior to their return to Mexico.

I

THE INS INVESTIGATORS' DEMAND FOR THE SUSPECTED ALTERED ALIEN REGISTRATION RECEIPT CARD FROM THE ALIEN WAS NOT A TRANSACTION COVERED BY THE "REQUIRED RECORDS" DOCTRINE AND CONSTITUTED A VIOLATION OF THE ALIEN'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

A. Application of the Privilege of an Alien.

An Alien is entitled to protection under the Fifth Amendment, United States Constitution. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

B. The Circumstances Surrounding the Demand and Production of the Altered Card.

The factual circumstances surrounding the successful interrogation by investigators of the INS are essential to a fair analysis of the applicability of the privilege against self-incrimination. Investigator Burrow had been in the apartment during the retrieval of the clothes of Miguel Rico, his prisoner, when his fellow investigator, Jacobs, interrogated the defendant. At that time he examined the card of the defendant, but found no flaws in it. After another alien Rodriguez-Ortiz was arrested shortly thereafter for possession of an altered alien registration receipt card, agents Burrow and White returned to the apartment where the defendant was located. They entered with their prisoner Rodriguez-Ortiz to secure his clothing, but this time Investigator Burrow asked for the respondent's alien registration receipt card.. This investigator stated his reason for asking for the card: "Because Mr. Ortiz presented an altered—what appeared to be an altered alien registration receipt card—and I thought since there was one in the apartment there was a possibility that Mr. Campos' card too was altered." (App. 48) Then Mr. Campos produced the altered card. When the defendant handed the card to the agent, such tendering

constituted proof of his possession of the unlawful card. Also this Federal investigator asked him if he was sure that the card was his. (App. 49)

This short inquiry produced sufficient evidence to convict the defendant of the unlawful possession of a falsely made or altered alien registration receipt card in violation of 18 U.S.C. 1546.[2] The alien registration receipt card itself was not the sole incriminating evidence produced, even though it was a principal and necessary part of the case against the defendant. The elements of the charged offense may be summarized as (1) the defendant's knowing possession of the card, (2) the altered or falsely made card, and (3) the defendant's knowledge that it was falsely made (See Indictment, App. 7-8; 18 U.S.C. 1546). The card alone would not establish guilt. His handing over of the card established knowledgeable possession, and his comments recognized the alterations or falsity of the card. In this instance, as noted by the Court of Appeals, the production of the forged card was substantially equivalent of the individual saying "I did it." (App. 127)

C. Historical Development of the Privilege Against Self-Incrimination and the "Required Records" Exception.

The recognized starting point in the development of the Fifth Amendment privilege against self-incrimination is the landmark case of *Boyd v. United States*, 116 U.S. 616 (1886). An information was filed for the seizure and forfeiture of thirty-five cases of plate glass. A statute provided forfeiture, as well as criminal penalties, for those who made a false statement in connection with imported merchandise. The action of the District Court was only for the civil forefeiture. After the goods were seized, the petitioner claimed the goods. The petitioner pursuant to a notice to produce

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[2]The respondent accepts the judgment of the Court of Appeals for this portion of the argument but reserves the right to question the application of this statute to this type of card.

presented a certain invoice concerning a prior shipment which was necessary and important in the forfeiture proceeding. This Court held that the notice to produce the invoice, the order, and the underlying statute authorizing such production were unconstitutional. 116 U.S. 616, 638.

The opinion of Justice Bradley held that this forceable requirement of a person's private papers was within the protection of the Fourth Amendment:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure. 116 U.S. 616, 622.

The Court then went on to point out the close relationship of the Fourth and Fifth Amendments. 116 U.S. 616, 633.

The critical distinction in the *Boyd* case is the fact that the papers involved were "private papers." However, the specific private paper was an invoice, a document furnished by someone else. The Court did not in detail describe what constituted a private paper, but it would appear that the application of *ejusdem generis* rule would indicate that the alien registration receipt card possesses a more personal quality than an invoice on plate glass. A characterization of the document as a "private" or a "public" document serves no useful purpose, for the privilege against self-incrimination was to protect a defendant from producing that evidence which would result in his conviction, or as in the *Boyd* case, the forfeiture of his property. In the *Boyd* case the defendant was required to produce a specific invoice, a single document that would prove the case against him, and in the instant case, the respondent was required to produce a single document.

The "required records" exception, for whatever vitality it still possesses, has been traditionally limited to the cir-

cumstances of corporate or other business records. The interest of the Government in such records required to be kept is directed at general records, such as records kept in the ordinary course of business. A governmental inquiry of such records would not violate the privilege against self-incrimination. If, however, that inquiry narrows down to a specific document—a document thought to establish guilt of the defendant, then the Fifth Amendment privilege against self-incrimination comes into play, and it would be contrary to the simple reading and intent of the Constitution to allow the "required records" exception to defeat it.

In *Ballman v. Fagin*, 200 U.S. 186 (1906), Justice Holmes wrote the opinion in which it was held that the defendant could not be required to produce a cash book before a Grand Jury where it might incriminate him.

The Government in its Brief (p. 9) contends that the decision in *Wilson v. United States*, 221 U.S. 361 (1911), was the origin of this "required records" doctrine. In *Wilson* the trial Court issued a subpoena duces tecum to the corporation to have certain records, including a letter press copy book, of the corporation brought before a Grand Jury. The books were kept in the possession of the president, Wilson, but the Board voted to turn over the books to the Grand Jury. Wilson refused, and provisions were even made so that Wilson's personal correspondence could be withdrawn from the books requested prior to presenting them to the Grand Jury. The president still refused. The Court, through the opinion of Justice Hughes, held that the privilege against self-incrimination could not be used to defend against the production of the corporate books. The Court made specific reference to the *representative* capacity in which the corporate books were held. However, the Court went further than required for disposition of the case and announced that the privilege was not available to public officers who kept records or even to those who had in their possession "records required by law to be kept in order that there may be suitable information of transactions which are the appro-

priate subjects of governmental regulation and the enforcement of restrictions validly established." 221 U.S. 361, 380. The holding in the *Wilson* case was succinctly evaluated by Justice Frankfurter in his dissenting opinion in *Shapiro v. United States*, 335 U.S. 1 (1948), where he stated:

> The *Wilson* case was correctly decided. The Court's holding boiled down to the proposition that "what's not yours is not yours." 335 U.S. 1, 58.

Justice McKenna dissenting in the *Wilson* case did accurately summarize the purpose of the privilege:

> The spirit of the privilege is that a witness shall not be used in any way to his crimination. When that may be the effect of any evidence required of him, be it oral or documentary, he may resist. He cannot be made use of at all to secure the evidence. This must necessarily be the extent of the privilege. 221 U.S. 361, 390-391.

The defendant recognizes and respects, as did the Court of Appeals (App. 127), the legitimate right of the Government to conduct a neutral inquiry and to require the submission of a report. The Government could require a person to make a return even though that person might be privileged from completing certain answers in the return. *United States v. Sullivan*, 274 U.S. 259, 263 (1927).

In *United States v. White*, 322 U.S. 694 (1944), this Court upheld the contempt citation for a union officer who failed to produce the records sought by a subpoena duces tecum issued to a local of a union requiring its constitution, by-laws, and records showing collections of work permit fees. This Court held that the privilege was personal and could not be utilized by a corporation or organization and outlined the ambit and purpose of the privilege:

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and *investigatory proceedings* upon a plane of dignity, humanity and impartiality. It is designed

> to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and *authenticate* any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal framework as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness. 322 U.S. 694, 698-699. (Emphasis added).

In the instant case the respondent was required to "authenticate" the document by his production of that card thereby establishing his possession of this document as his, which was an essential element of the offense. The INS investigators were able to demand that document from him "by force of law" under 8 U.S.C. 1357(a)(1) which permitted them to "interrogate any alien or person believed to be an alien as to his right to be in or to remain in the United States." This compulsion by law to produce the altered document during an investigation narrowed to this specific purpose is not consistent with the ban established by the Fifth Amendment.

The disposition in *Davis v. United States*, 328 U.S. 582 (1946), turned upon the lawfulness of a search and seizure. However, the defendant's handing over of the contraband gasoline ration coupons did touch upon the protection of the privilege against self-incrimination under the Fifth Amendment. The important and immediate distinction in the *Davis*

case was that the defendant was properly arrested prior to the questioned search. Pursuant to the demands of the agents *at his business establishment*, he produced the unlawful gaosline ration coupons. This Court indicated that because the Government owned the coupons they were not private papers, but the property of the Government and subject to inspection and recall by it. The Court made careful reference to the fact that it was a *business establishment* and distinguished the decision in *Amos v. United States*, 255 U.S. 313 (1921),[3] in which a private residence was searched. In the instant case Campos-Serrano was subjected to the demand at his private residence, and the *Amos* case would appear applicable to the instant situation to provide protection. Justice Frankfurter in his dissent criticized the "so-called public papers" exemption which would excuse compliance with the Fourth Amendment and the defendant's right of privacy. 328 U.S. 582, 596-597.

The "required records" phrase was referred to by this Court for the first time in *Shapiro v. United States*, 335 U.S. 1, 17 (1948). In this case the petitioner was convicted of a tie-in sales in violation of regulations under the Emergency Price Control Act. The petitioner had to respond to the administrative subpoena duces tecum of the Office of Price Administration to bring with him invoices, sales books, ledgers, and inventory records. These records requirements were established for businesses, and the Court held that they applied to non-corporate businessmen. 335 U.S. 1, 19. The broad language of the opinion of Chief Justice Vinson went far beyond the factual circumstances contained in the *Shapiro* case for the result obtained, but even this opinion recognized that there were limitations:

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[3]Revenue agents came to the defendant's house in search for violations of the law and were allowed entry by the defendant's wife in deference to their authority. There was no valid consent. The analogy is easily drawn to the instant case, except that the INS agents on the second entry had a very narrow purpose.

> It may be assumed at the onset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. 335 U.S. 1, 32.

Justice Frankfurter, one of the four dissenters in the *Shapiro* case, raised the critical question as to whether or not "public records" fell outside the protection of the Fifth Amendment. His comment that "Ready-made catch-phrases may conceal but do not solve serious constitutional problems" has definite application in this case. His analysis (335 U.S. 1, 50-70) points out the necessity for a clear delineation and limitation of the "required records" exception to the privilege against self-incrimination. If the *Shapiro* case is limited to the situation involving the records of businessmen, then it could not be properly extended here to the situation of Campos-Serrano. Justice Frankfurter made reference to a "parade of horribles" into which the defendant would fall, because under the unrestrained application of the "required records" exemption the Government would be able to enter a man's home to examine or seize a public record, with or without a search warrant, at any time. 335 U.S. 1, 54-55. Justice Jackson in his dissenting opinion in *Shapiro* predicted the unwarranted extension of this doctrine that the Government now seeks to apply to Campos-Serrano:

> The protection against compulsory self-incrimination, guaranteed by the Fifth Amendment, is nullified to whatever extent this Court holds that Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who can then use it to convict him. Today's decision introduces a principle of considerable moment. Of course, it strips of protection only businessmen and their records; but we cannot too often remind ourselves of the tendency of such a principle, once approved, to expand itself in practice, "to the limits of its logic." 335 U.S. 1, 70.

In the instant case, the INS investigators used their statutory power (8 U.S.C. 1357(a)(1)) to require the defendant to prove conclusive evidence of his guilt of the offense of possession of an altered and forged alien registration receipt card.

D. Pre-*Marchetti* Restrictions On "Required Records" Doctrine

The Government contends that prior to the decision in *Marchetti v. United States*, 390 U.S. 39 (1968), there were only two limitations under the Fifth Amendment on its power to require the maintenance and disclosure of documents and information: (1) the requirement that the disclosure serve a legitimate regulatory purpose and (2) that the requirement would not have the effect of compelling members of a group inherently suspect of criminal activities. *Brief of the United States* p. 14. The defendant would contend that the first requirement, as stated, far exceeds the actual decision in *Shapiro v. United States*, but this analysis points up the interrelationship of the two requirements. If the first requirement was not restricted, Congress could eliminate the privilege. If the first interrogation in the apartment of the defendant might be treated as an exercise of the "legitimate regulatory purpose" in determining the status of a person believed to be an alien by an INS official, such characterization could not properly be affixed to the second interrogation. The entry into the apartment for the second time of an INS investigator, armed with the suspicion that this alien possessed an altered alien registration receipt card, fell outside of his "general legitimate regulatory inquiry" as to status of aliens within the United States and was for the purpose of extracting a document, the subject matter of a later felony prosecution. The underlying statute (8 U.S.C. 1357(a)(1) authorizes Government agents to inquire as to the status of persons within its borders believed to be aliens. That was clearly not the purpose of the second inquiry.

In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), this Court held that an order of this administrative board to register an individual member of the Communist Party violated the individual's privilege against self-incrimination. An admission of membership in this party might have been used to criminally prosecute for failure to register. The principal limitation restricting the inquiry by the INS investigators upon their second entry into the apartment was the rule in the *Albertson* case (the second requirement), and the Court of Appeals made reference to this case (App. 127). The rationale of the *Albertson* case was recognized by the Court of Appeals when it said:

> However, when the inquiry itself is directed at determining a criminal violation such as in this case where the agents are looking for forged "cards" and the defendant's card had previously been examined, the privilege should apply. (App. 127).

E. *Marchetti* and Subsequent Cases

In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court held that the statutory requirements of registration violated the privilege against self-incrimination, and the convictions for wilful failure to pay an occupational tax on gambling and wilful failure to register as a gambler were set aside. The Court stated by whom the privilege could be used:

> The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed, on what must ordinarily be a fiction, have precisely the infirmities

> which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred." 390 U.S. 39, 51.

In the *Marchetti* case the Court outlined three essential elements of the *Shapiro* doctrine. The three elements were that (1) the defendant was obliged to keep and preserve records "of the same kind as he customarily kept," (2) that the records possessed "public aspects," and (3) that the records were imposed in an essentially noncriminal and regulatory area of inquiry and not directed to a selective group inherently suspect of criminal activities. 390 U.S. 39, 55-57.

It is obvious that the record kept in the instant case, the alien registration receipt card, is not of a kind customarily kept, and the Government argues that this requirement has no application in this case. (*Brief of the United States* p. 18). To eliminate this requirement would constitute an unwarranted expansion of the decision in *Shapiro v. United States*, 335 U.S. 1 (1948), and this exception of the privilege against self-incrimination should not be so easily altered and expanded. Although it could be argued that the alien registration receipt card does contain public aspects under the statutory scheme to identify alien immigrants, it also contains very personal aspects in acting as an identification card. The document is personalized because of the identifying material that it contains, including the photograph of the alien, and it is certainly not the type of public document outlined in *Shapiro v. United States* which was concerned with the operating documents of a business. It would be difficult to say that this was less than the "private" paper (the invoice) in *Boyd v. United States*, 116 U.S. 616 (1886). Since this characterization as a "public document" cannot be easily made in this case, this "required records" exception should not be permitted "to swallow up the rule" (the privilege). The third requirement focuses on the critical aspect of this case. An alien who may possess an alien registration receipt card is generally not one of a selec-

tive group and suspect of criminal activity, and therefore, the Government may enforce its noncriminal regulatory scheme of inquiry as to the status of such aliens in the United States without conflict with the privilege. However, this right of general inquiry evaporated when the INS investigators sought to use this statutory power to have the defendant produce specific incriminating evidence, the altered card, for then the limitation of the *Albertson* case came into play because this type of inquiry conflicted with the privilege.

Both the exception to this privilege and its limitation were recognized by Justice Brennan in his concurring opinion in *Marchetti v. United States*, and *Grosso v. United States*, 390 U.S. 72 (1968), when he stated that he sought not to have the holdings modify the decision in *United States v. Sullivan*, 274 U.S. 259 (1927), or *Shapiro v. United States*, but went on to note, "On the other hand, we know that where the governmental scheme clearly evidences the purpose of gathering information from citizens in order to secure their conviction of crime, its contravenes the principle." 390 U.S. 72, 73.

In *Haynes v. United States*, 390 U.S. 85 (1968), the conviction of the petitioner for knowing possession of a firearm which had not been registered as required by statute was reversed. The invalid governmental tax statutes were directed at those "inherently suspect of criminal activities." The Court held:

> Nonetheless, these statutory provisions, as now written cannot be brought within any of the situations in which the Court has held that the constitutional privilege does not prevent the use by the United States of information obtained in connection with regulatory programs of general application. See *United States v. Sullivan*, 274 U.S. 259; *Shapiro v. United States*, 335 U.S. 1." 390 U.S. 85, 98.

Recently this Court had reason to rule on a not too dissimilar situation involving the state statutory "hit-and-run"

requirement that a person involved in an accident stop and give his name and address. This Court was required to balance the right of society to acquire essential information and the right of the individual to his privilege against self-incrimination. The giving of the name and address would not constitute incrimination, but it could act as a "link in a chain" leading to his prosecution and conviction. The Court in the opinion of the Chief Justice stated, "In order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'" *California v. Byers*, ____ U.S. ____, 91 S.Ct. 1535, 1538 (1971). For Campos-Serrano the hazard could not have been greater. The Chief Justice then referred to and quoted the *Albertson* decision and its distinguishing of the *Sullivan* case:

> In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a *highly selective group inherently suspect of criminal activities.* Petitioner's claims are not asserted in an *essentially noncriminal* and *regulatory area* of inquiry, but against an inquiry in an area permeated with criminal statutes, where a response to any of the * * * questions in context might involve the petitioners in the admission of a crucial element of crime. 382 U.S. at 79, 86 S.Ct. at 199. (Emphasis in original). 91 S.Ct. 1535, 1538.

Dimas Campos-Serrano was within a highly selected group, i.e. a single individual, inherently suspect of criminal activities, i.e. possession of a forged card. The interrogation and demand conducted upon the second inquiry transcended any essentially noncriminal and regulatory area of inquiry into his status as an alien, and therefore he possessed the privilege against self-incrimination.

Efforts to erode this fundamental constitutional right have always been supported by arguments of governmental efficiency and the facilitation of prosecutions, but the admonitory sentiments *(obsta principiis)* of Justice Bradley in *Boyd*

v. United States, 116 U.S. 16 (1886), are worth reechoing for their even greater meaning today:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of their right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. 116 U.S. 616, 635. Quoted by Justice Frankfurter, dissenting opinion in *Shapiro v. United States*, 335 U.S. 1, 69, and portion cited by Chief Justice Warren in *Miranda v. Arizona*, 384 U.S. 436, 459 (1966).

II

THE CIRCUMSTANCES SURROUNDING THE INTERROGATION OF THIS ALIEN SUSPECT CREATED A COERCIVE ATMOSPHERE REQUIRING FEDERAL AGENTS TO GIVE A *MIRANDA* WARNING

The giving of the warning required in *Miranda v. Arizona*, 384 U.S. 436 (1966), depends upon whether the defendant Dimas Campos-Serrano was "in custody or otherwise deprived of his freedom of action in any significant way," 384 U.S. 436, 445, and in a setting in which his freedom of action was curtailed in a significant way. 384 U.S. 436, 467. Campos-Serrano had no criminal record or any prior violation of the Immigration laws (App. 116) giving rise to the natural inference that he had only limited contact with police or INS investigators. He was further handicapped by his inability to speak English, a language barrier not constituting any form of restriction to the experienced bilingual investigators. Campos-Serrano was on alien soil in a ques-

tionable status; he had no standing to challenge or assert legal restrictions that might be imposed upon the police agents by virtue of a constitution unfamiliar to him. These INS investigators made an unhesitating authoritative demand in the defendant's own apartment. Their conduct lacked any showing of deference to another human being—even to a limited respect of privacy in his own home. The fact that the agents on both their first and second entry were there only for the purpose of guarding another prisoner while that prisoner retrieved his clothing, did not in any way inhibit their demands or interrogation. The circumstances manifested the overwhelming power of these police agents to seize persons—aliens like the defendant, and this fact was readily understood by Campos-Serrano. The defendant had no choice but to submit to the demands and directions of these Federal agents, and when the choice of an individual is so circumscribed by the overpowering presence and manifestation of the Federal agents, it is submitted that this individual is in custody or otherwise deprived of his freedom in a significant way.

These INS investigators, operating without judicial or administrative warrants, were participants in a Task Force Arrest Party. Their assigned mission was to seize and apprehend persons illegally in the United States. They possess both the legal power and its aura, and they were clearly a forceful arm of the Government. Although there may be certain advantages in this type of roundup of illegal aliens, such Federal agents, operating without some prior judicial approval, should be most circumspect in their individual activities and should painstakingly respect the rights granted by the Constitution to any person, even aliens or persons illegally in the United States.

Our system of justice in recognizing the inherent worth and dignity of each person seeks to establish some minimum parity between the Government and the individual. It is a most difficult adjustment. One cannot be put at a serious disadvantage to the other, because the essential equilibrium

between the individual and the state is a result of delicate, interdependent dynamics that must survive in the "real world." Our founding fathers, armed with the lessons of history, adopted the Fifth Amendment privilege against self-incrimination. This provision was neither unwise nor impractical. The injury to the Government is infinitesimal compared to the injury to the individual by the compelled disclosure of evidence of a crime. The rack and the rope and their ancillary techniques, hopefully, are anachronistic and obsolete tools of Government. Sophisticated pressures have replaced these obnoxious physical instruments. Such pressures often depend upon the standing of the individual with respect to the agents of the state, and in this case there existed an enormous disparity, in which the Government agents clearly held the commanding position. This was not the courteous interrogation of the revenue agent of the businessman. With a sophisticated businessman, the agents would probably confront a person who understood the authority of his interrogators and his possible right to resist. Even there the businessman might be at a serious disadvantage if he did not know that he was a suspect of a criminal wrong. With Campos-Serrano the investigator took advantage of the disparity of the position and his legal authority to force the production of what was thought to be, and proven so, a forged card, and under these circumstances the *Miranda* warning (384 U.S. 436, 479) should have been given.

It is difficult to specify or detail a more precise requirement as to when the Fifth Amendment privilege necessitates a warning by law enforcement officers. One might attempt to measure the intensity of the need for protection of the principle by the proximity of the possible incrimination. If the statement might provide only leads, then there may be a less requirement for a warning.[4] If the requested produc-

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[4] See *California v. Byers*, ____ U.S. ____, 91 S.Ct. 1535 (1971), *supra*.

tion constituted the very evidence of the crime then the warning might be required. In *Mathis v. United States*, 391 U.S. 1 (1968), the defendant identified certain tax forms and his signature thereon during a tax investigation conducted at a state prison, and in *Orozco v. Texas*, 394 U.S. 324 (1969), the defendant admitted ownership of and advised as to the location of a gun involved in the criminal shooting. Campos-Serrano was in far greater danger of having his privilege against self-incrimination jeopardized by the production of an alien registration receipt card, and he was in much greater need for the advice concerning the existence of such constitutional privilege.

The Court of Appeals determined that there was sufficient compulsion to trigger the *Miranda* warning requirement. The Court of Appeals found the case to be within the boundaries of the custodial interrogation of *Orozco* and the noncustodial interrogation in *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), which held that a criminal tax investigator had to give a *Miranda* warning to a suspect questioned at his place of business. Dimas Campos-Serrano was entitled to make an intelligent exercise of his constitutional privilege, and he was entitled to some statement by the investigator acknowledging that they were bound by the Constitution to respect the exercise of such privilege. The Court of Appeals did not hold that the decision was the equivalent of the rule announced in the *Dickerson* case,[5] and the decision in the *Orozco* case appears to be more appropriate. The *Orozco* decision has been characterized by some as extending the *Miranda* warning requirement beyond the

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[5] Although the Government is dissatisfied with the judgment of the Seventh Circuit Court of Appeals in *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), this case is not now (nor appears to have been) subject to review by this Court. Both the Government's Brief (p. 30) and the Brief of the State of Illinois as Amicus Curiae (p. 3) placed substantial emphasis on the error of that decision. This case should not be used as the vehicle for review of the *Dickerson* case.

police station. Hopefully, the protection provided by the Fifth Amendment is not restricted to the police station. In this type of case, there would have been no police station interrogation. The only interrogation of any import would have taken place "on the street" or away from the INS headquarters, for once the suspect was taken into custody he would be processed administratively.[6] The interrogation conducted in the apartment had the equivalent of a police station interrogation, and the *Miranda* warning should be held applicable to this situation. It would be an unrealistic distinction to make the privilege depend upon some geographical locale. See *Katz v. United States*, 389 U.S. 347, 351, (1967).

The *Miranda* test for the application of the prescribed warning requirement—"taken into custody or otherwise deprived of his freedom by the authorities in any significant way" (384 U.S. 436, 478) is a fundamental and reasonable standard. It is in the nature of "reasonable doubt" (cf. *In re Winship*, 397 U.S. 358 (1970)), and "harmless error" (cf. *Chapman v. California*, 386 U.S. 18 (1967)). Such basic standards are often only confused by unnecessary amplification which is more often than not circuitous. A test upon a test is suggested by the Government (*Brief of the United States*, p. 32 and *Brief of the State of Illinois as Amicus Curiae*, pp. 14-15), when it suggests the "reasonable innocent man test." Does not the privilege extend to the guilty as well as the innocent? The answer would appear to be obvious, yes. *Marchetti v. United States*, 390 U.S. 39, 51 (1968). The very opinion quoted for this standard, *Hicks v. United States*, 382 F.2d 158 (D.C. Cir. 1967), written by the Chief Justice, then a Circuit Judge, points out that even with the "reasonable innocent man" test the defendant's

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[6]Even though the INS agents arrested Campos-Serrano for a felony on 19 November 1968 and held him continuously in custody, his first appearance before a judicial officer appears to be 16 December 1968. (App. 3) This unnecessary delay resulted in the suppression of an alleged confession. (App. 92-93)

subjective beliefs are a factor to be considered by the trial court along with evidence of his conduct *and all the surrounding circumstances.* 382 F.2d 158, 161. The elusive proposed standard will be most difficult to apply, for the application is to a state of mind. The court applying the standard to the defendant's state of mind will be often unwilling to accept the statements of the best source, for reasons which are quite obvious. The *Miranda* standard, applied to physical facts as well as to the state of mind of both the interrogators and the interrogated, appears far more reasonable and understandable. The determination of the best type of test to be followed in determining the existence of custody or restraint of freedom is not necessary to the fair disposition of the case, for the very nature and circumstances of this interrogation constituted the precise evil the Fifth Amendment was designed to obviate.

III

THE ALIEN REGISTRATION RECEIPT CARD IS NOT A "DOCUMENT REQUIRED FOR ENTRY INTO THE UNITED STATES" (18 U.S.C. 1546)[7]

The defendant was indicted and convicted of possession of an altered and falsely-made "document required for entry into the United States" in violation of 18 U.S.C. 1546. This statutory crime was first enacted by the Immigration Act of 1924 (Section 22, 43 Stat. 165), but applied only to an "immigration visa or permit." In 1948 it was compiled as

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[7] The jurisdictional issue as to the sufficiency of the indictment to state an offense is raised in this Court, as it was in both the district court and the court of appeals. Jurisdiction is a threshold question that should again be reviewed by this Court. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209 (1963), Stern and Gressman, *Supreme Court Practice* 298 (4th Ed. 1967). This matter was also asserted in this Court on the behalf of Dimas Campos-Serrano in a combined conditional cross-petition for writ of certiorari and brief in opposition to the petition in this case, filed as No. 6382, October Term 1970. No action has been taken on this cross-petition by the Court.

a part of the Federal Criminal Code (62 Stat. 771). In the comprehensive Immigration and Nationality Act of 1952 this Criminal Code section was extended to include "immigrant or non-immigrant visa, permit, or other document required for entry into the United States." (66 Stat. 275). The question as to jurisdiction is whether an alien registration receipt card, Form I-151 of the INS, is such a document.

The alien registration receipt card serves as evidence of the registration of the holder as an immigrant and contains information identifying the resident alien. This card also contains a statement that it will be honored in lieu of a visa and passport on the condition that the rightful holder is *returning* to the United States after a temporary absence of not more than one year and is not subject to exclusion under any provision of the Immigration Laws. (Govt. Ex. 1, App. 107, 119). The very name and nature of an alien registration receipt card indicates that its acquisition occurs *after* entry into the United States, and the ancillary authorization is strictly limited to a *temporary* absence in which the person is *reentering.*

The original statute was limited to two types of documents—an immigrant visa and a permit—and the 1952 amendment added the "non-immigrant visa" and "document required for entry." The Congressional intent manifested the continued pattern of a limited class of documents, for Congress would not have added "non-immigrant visa" if it intended the "document required for entry" to be a "catch-all" provision. Hence, Congress took pains to specify the very nature of the documentation to be made the subject matter of this criminal offense, and it could not reasonably be contended that Congress by this generic terminal phrase intended to authorize the INS the authority to determine the type of documents to be included within the felony offense. The enactment reveals the continued limitation to documents to serve as legal authority for the initial entrance of aliens into this country, but could not be reasonably extended to documents that provide identification subsequent to entry.

Although the term "permit" is 18 U.S.C. 1546 had reference to a reentry permit (Section 10 of Immigration Act of 1924), the qualifying term now set forth in Section 1546 is "entry." Since the alien registration receipt card is used only in a *reentry* situation, it must be treated as a document required for *reentry*, but not entry. In *Lau Ow Bew v. United States*, 144 U.S. 47 (1892), the Court held that the Chinese Exclusion Act of 1882, which required a certificate from the Chinese government for every Chinese person about to come into the United States, did not apply to a Chinese merchant who had previously been a United States resident for seventeen years. The *Lau Ow Bew* distinction between an "entry" and a "reentry" was referred to in *McFarland v. United States*, 19 F.2d 807 (6th Cir. 1927), dealing with this same statutory provision (then 8 U.S.C. 220), where the Court of Appeals refused to give an interpretation to the statute that was "verbally possible" and reversed the conviction. The Court of Appeals for the Seventh Circuit did not agree with this line of reasoning (App. 125), but the mode of statutory construction previously adopted by this Court and as interpreted by the Court of Appeals for the Sixth Circuit in the *McFarland* case should not have been disregarded. The distinction was geared to a situation involving immigrants, and Congress would be presumed to recognize the fact that such distinction existed at the time of the subsequent Immigration and Nationality Act of 1952. (Pub. L. 82-414, 66 Stat. 275).

The comprehensive codification of the existing laws relating to Immigration and Nationality in the 1952 Act did not only include Title 8 (aliens and nationality), but also included the amendment to 18 U.S.C. 1546 (Section 402(a)). After a careful comparison of certain provisions appearing in Title 8 as compared with 18 U.S.C. 1546, there emerges the design of Congress not to include the alien registration receipt card within the terms of 18 U.S.C. 1546 regulating documents required for entry. The second paragraph of 18 U.S.C. 1546 expressly prohibits the counterfeiting of a document required for entry:

> Whoever . . . makes any print, photograph, or impression in the likeness of any immigrant or non-immigrant visa, permit, or other document required for entry into the United States . . . shall be fined not more than $2,000 or imprisoned not more than five years, or both.

In this same law enacted by Congress there was also promulgated another section specifically governing the counterfeiting of an alien registration receipt card. Section 266(d) of the Immigration and Nationality Act of 1952 (then and now 8 U.S.C. 1306(d)) provided:

> Any person, who with unlawful intent, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any certificate or alien registration or any *alien registration receipt card*, or any colorable imitation thereof, except when and as authorized under such rules and regulations as may be prescribed by the Attorney General, shall upon conviction be fined not to exceed $5,000 or be imprisoned not more than five years, or both. (Emphasis added).

If the provision for "documents required for entry" of 18 U.S.C. 1546 applies to alien registration receipt cards, then Congress need not have adopted another specific section in 8 U.S.C. 1306(d) to cover the counterfeiting of such documents. The Court of Appeals misconstrued this argument, for it assumed that this argument meant that Section 1306(d) covered the *possession* of a forged alien registration receipt card. Respondent did not contend that Section 1306(d) covered the question of possession, but only used the argument that if a special section was created for the counterfeiting of alien registration receipt cards (8 U.S.C. 1306(d)), then that similar provision in Section 1546 was unnecessary. One or the other section was mere surplus. It is most difficult to understand that Congress *in the same Act* created a useless surplus provision for alien registration receipt cards. The principles of statutory construction are designed to save and not destroy legislation, and it is the

duty of the Court to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section. *United States v. Menasche,* 348 U.S. 538-539 (1955). The statute must be given a reasonable construction which gives effect to all of its provisions, and the Court should not adopt a strained reading which would render one part a mere redundancy. *Jarecki v. G. D. Searle and Co.,* 367 U.S. 303, 307-308 (1961). The Immigration and Nationality Act of 1952 should be construed to give effect to both sections (18 U.S.C. 1546 and 8 U.S.C. 1306), and this natural and essential consistency can be achieved by the simple recognition that the alien registration receipt card is not a document required for entry within the scope of 18 U.S.C. 1546. Also, the rule of construction that the specific will govern the general adds additional weight to the conclusion that the separate meaning of the specific section dealing with the counterfeiting of alien registration receipt cards (8 U.S.C. 1306(d)), must be given effect, and therefore, the alien registration receipt card should be recognized as distinct from the document required for entry (18 U.S.C. 1546).

Although there is no specific section dealing with the possession of an altered alien registration receipt card, the overall and comprehensive scheme of the Immigration and Nationality Act of 1952 did provide an appropriate section (Section 275) codified in 8 U.S.C. 1325 to cover the situation. That section provides that "Any alien who . . . (3) obtains entry into the United States by a wilfully false or misleading representation or the wilful concealment of a material fact" shall be subject to a criminal penalty for a first offense of not more than six months or a fine of not more than $500, or both. The presence of Dimas Campos-Serrano in the United States and the possession of an altered card would give rise to a possible violation of 8 U.S.C. 1325. The use of a false or altered alien registration receipt card would be a possible manner in which a false representation was used to obtain entry. The thrust of the wrong done was the gaining access to the United States by

a false or fraudulent means, whereas the specific means is of secondary significance. The thrust of a violation under 18 U.S.C. 1546 is to prevent those seeking entry into the United States from using false documentation that would provide apparent legal status within the United States. There exists substantial overlap between these two statutory sections, but since there exists some ambiguity and confusion as to precise delineation intended by Congress, the principle of lenity should be applied. When faced with the determination of whether the alleged wrongful conduct constitutes a felony or a misdemeanor, the Court should adopt the construction that treats the conduct as a misdemeanor. Although the Bank Robbery Statute (18 U.S.C. 2113) could be construed to provide several and separate punishments, this Court in *Heflin v. United States*, 358 U.S. 415, 419 (1959), stated that the Court resolved an ambiguity in favor of lenity when required to determine the intent of Congress in the punishment of multiple aspects of the same criminal act. In *Ladner v. United States*, 358 U.S. 169 (1958), the Court announced that when Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity would be resolved in favor of lenity. The Court specifically stated:

> This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. 358 U.S. 169, 178.

The policy of lenity is applicable in this case where the document required for entry is not sufficiently described by the felony statute (18 U.S.C. 1546), but the circumstances are such that it could be characterized as a misdemeanor.[8]

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[8]The INS still possesses administrative authority to have an illegal alien voluntarily returned to Mexico or subjected to deportation proceedings, which do not involve criminal proceedings.

Also, the Immigration and Nationality Act of 1952 should be reconciled so as to produce a symmetrical whole or comprehensive scheme and avoid nullifying specific sections. *Federal Power Commission v. Panhandler Co.*, 337 U.S. 498, 514 (1949).

In addition to the statutory framework supporting the interpretation that the alien registration receipt card is not within 18 U.S.C. 1546, the published administrative regulations of INS also support this contention. In the regulations providing for the registration and fingerprinting of aliens (8 C.F.R. 264.1 (January 1969)), there are two classifications of forms. In 8 C.F.R. 264.1(a), the prescribed *registration* forms, which include an Application for Status as a Permanent Resident (Form I-485), are enumerated in detail, and in 8 C.F.R. 264.1(b), the forms serving as *evidence of registration*, which included the Alien Registration Receipt Card (Form I-151), are set forth. Those registration forms which are applications that must be submitted to secure entry into the United States are probably protected by the penal sanctions of 18 U.S.C. 1546, but the certificates or cards issued in response and subsequent to the application form which serve as proof of evidence of residency already acquired cannot logically be called "documents required for entry."

Congress could have amended 18 U.S.C. 1546 to include alien registration receipt cards, but the specialized treatment given to the alien registration receipt cards in Title 8, including a specific section for the counterfeiting of such card, the overall general statutory scheme, the very evidentiary nature of the alien registration receipt card, leads to the unavoidable conclusion that it is not a document required for entry. In *McFarland v. United States*, 19 F.2d 807 (6th Cir. 1927), the Court was faced with the issue as to whether or not the statute applied to a given fact situation. That statute was narrowly construed and the conviction was reversed. The Court of Appeals held:

> The words of the statute must be such as to leave no reasonable doubt as to the intention of the

> Legislature, *United States v. Hartwell*, 6 Wall. 385, 18 L.Ed. 830; and where there is any well-founded doubt as to any act being a public offense, it should not be declared such, *Harrison v. Vose*, 9 How. 372, 13 L.Ed. 179. 19 F.2d 807, 808.

This Court should be guided by the same reasoning which would hold that the indictment failed to state an offense and was jurisdictionally deficient. The defendant should have been charged with no more than a violation of 8 U.S.C. 1325, a misdemeanor, and the indictment should have been dismissed.[9]

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[9]Trial defense counsel was unaware of the unpublished opinion in *United States v. Fernandez-Gonzalez*, 64 C.R. 101 (N.D. Ill. 1964), that dismissed an indictment charging a violation of 18 U.S.C. 1546 for almost precisely the reasons now asserted by the respondent. In its thirty-five page answer to the motion to dismiss in the trial court, the Government inadvertently overlooked this opinion, but did include it as an appendix to its brief in the Court of Appeals. The respondent includes it as a Special Appendix to this brief. The substance of the holding is referred to in *Fernandez-Gonzalez v. Immigration and Naturalization Service*, 347 F.2d 737, 739 (7th Cir. 1965).

IV

IN SUPPORT OF THE JUDGMENT OF THE COURT BELOW THE RESPONDENT URGES THE VIOLATION OF THE FOURTH AMENDMENT RIGHT AGAINST UNLAWFUL SEARCH AND SEIZURE, THE SIXTH AMENDMENT IN DEFENDANT'S DENIAL OF CONFRONTATION OF THE WITNESSES AGAINST HIM, AND THE FIFTH AND SIXTH AMENDMENT DENIALS OF SUFFICIENT FUNDS TO SECURE THE ATTENDANCE OF NECESSARY MATERIAL WITNESSES AS GROUNDS FOR THE REVERSAL OF THE CRIMINAL CONVICTION.[10]

A. The Interrogation of the Defendant and the Products of That Interrogation Were the Result of an Unlawful Search and Seizure in Violation of the Fourth Amendment.[11]

On the second entry into the apartment an agent, who had previously been in the defendant's apartment and had examined his alien registration receipt card, demanded the card. The stated purpose of the entry was to accompany their prisoner Rodriguez-Ortis for the purpose of collecting his clothing and personal belongings. The record fails to state any clear manifestation of consent on the part of the prisoner Rodriguez-Ortis to the entry into the apartment, and the defendant Campos-Serrano denied that he gave such consent. (App. 63)

The protection of the Fourth Amendment against unlawful search and seizure is no longer restricted to places, but affords protection to *people*. *Katz v. United States*, 389 U.S. 347, 351 (1967). In this case there was neither an arrest warrant for the defendant or for Rico or for Ortiz, and

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[10]These three grounds presented to the Court of Appeals were not reached because of the action taken on the issue involving the privilege against self-incrimination.

[11]It appears that a similar contention was raised, but not reached in *Orozco v. Texas*, 394 U.S. 324, 325 (1969).

there was also no search warrant. It is important to note that the series of arrests had been planned a day in advance when adequate opportunity would have existed to obtain arrest warrants for those suspects who were to be seized the following day. The entry into the apartments for both the first and second time is grounded upon the implied consent given by the prisoner, who was allegedly seeking to retrieve his clothing. The second entrance was based upon the consent of the prisoner Ortiz, for such consent must be implied by virtue of his production of a key and opening a door to the apartment. The record, at most, sets forth a very ambigious and uncertain type of consent on the part of the prisoner Ortiz. Defendant's counsel was denied the opportunity to examine the prisoners Rico or Ortiz or to produce them on behalf of the defendant on the issue of whether or not there was valid consent, because the Government (INS) had returned these witnesses to Mexico before they could be interviewed by defense counsel. The justification of the search of the defendant's apartment must be founded upon the alleged implied-in-law consent, if any can be said to exist, granted by the defendant Ortiz who was accompanied by the INS investigators into his apartment while he gathered his personal belongings. This record does not provide the sufficient factual statement to show any lawful consent by this prisoner or the circumstances. In *Bumper v. North Carolina,* 391 U.S. 543 (1968), this Court held:

> When the prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing *no more than acquiescence to a claim of lawful authority*. 391 U.S. 543, 548-549 (Emphasis added).

The evidence in this record has not discharged that constitutional responsibility.

Assuming arguendo that some form of consent has been given, the activity of Investigator Burrow, who had been previously in the apartment and had previously examined

the alien registration receipt card of the defendant, transcended the limits of any implied consent to enter for the purpose of retrieving the personal belongings of Ortiz. When Investigator Burrow commenced his interogation of the defendant upon the suspicion that the defendant might also possess an altered alien registration receipt card, he exceeded his authority of the consent allegedly granted by Ortiz and transgressed on the zone of privacy that protected the defendant in his own apartment.

Since the prisoner Ortiz could not be examined, circumstances surrounding the procedure by which the INS agents permitted the apprehended prisoners to return to their apartment to obtain personal belongings could not be subject to searching inquiry. However, the Court should not be unmindful of various stratagems developed by law enforcement officers to avoid judicial processes. Such Federal agents through the apparent "generous" permission granted to the prisoners to return to their apartment for their personal belongings reaped the unwarranted advantage or expedient of gaining access to living quarters without resort to judicial process for a warrant. This Court has repeatedly held that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, and that the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Chimel v. California*, 395 U.S. 752, 762 (1969); *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968). The inter-relationship of the Fourth and Fifth Amendments has been previously recognized by this Court. *Boyd v. United States*, 116 U.S. 616, 633 (1886), and *Davis v. United States*, 328 U.S. 582 (1946). In the *Davis* case the Court emphasized that the searched or compelled production had occurred at a place of business, and on that basis distinguished the case of *Amos v. United States*, 255 U.S. 313 (1921), which involved a search of a private residence. 328 U.S. 582, 592-593. The *Davis* case in this context would not permit the overreaching of the Federal agents in this case.

The defendant Campos-Serrano was entitled to a zone of privacy in his own apartment, and the conduct of the INS investigators clearly transcended it by their lack of a consensual entry and their failure to adhere to the limited scope of that entry. The card and any conversation of the defendant connected with the card should have been suppressed as a violation of the Fourth Amendment.

B. The Introduction into Evidence of an Immigration File With a Third Party Statement Was Inadmissible Hearsay and Denied the Defendant the Right to Confront the Witnesses Against Him Under the Sixth Amendment.

Over the objection of the defense, the Court admitted into evidence the application of Miss Vargas-Garcia for a new alien registration card and her statement that her card with number A14 713 099 was stolen. This evidence established that the card in issue was an authentic card, but it had been altered.

The Government introduced the file of Miss Vargas-Garcia without any foundation other than the fact that the record was certified by the INS District Director. The Government relied upon the statutory authority of the Attorney General to delegate duties to carry out the provisions of the laws relating to immigration and naturalization (8 U.S.C. 1103) and administrative regulations authorizing the District Director to certify records (8 C.F.R. 103.10(d)(ii)). Although this statute and implementing regulation might have been valid to certify records for civil and administrative proceedings, this procedure could not justify the introduction into evidence of such hearsay statements in a criminal proceeding involving a felony. To do so would violate the defendant's right to confront the witnesses against him protected by the Sixth Amendment and would be inconsistent with existing federal law as to the hearsay exception for public records.

The revised draft of the proposed *Rules of Evidence for the United States District Court and Magistrates*, 51 F.R.D. 315 (1971), sets forth an exception to the hearsay rule for public records and reports of public officials or agencies when the entry contains a report of activities of the official or agency or matters observed pursuant to a duty imposed by law. Factual findings resulting from an investigation can be used in criminal cases *only against the Government*, for otherwise there would be a collision with the confrontation rights of the accused in a criminal case. See Rule 803(8), 51 F.R.D. 315, 420 (1971).

A leading federal case, *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954), holds that all documents prepared by officials pursuant to a duty imposed by law or required by the nature of their offices are admissible as proof of the facts stated therein with the proviso that the facts stated in the document must have been within the personal knowledge and observation of the reporting official or his subordinates. 210 F.2d 795, 801. See also *Yaich v. United States*, 283 F.2d 613, 616 (9th Cir. 1960). The statement in the instant case is not that of the public official, but that of Miss Vargas-Garcia.

Also the unwarranted extension and abuse by the Government of the "public records" exception to the hearsay rule in using their records to otherwise present a hearsay statement of a third party witness was best criticized by the remarks of Chief Judge Denam in a civil case in *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952), which held:

> An absurdity would arise from application of the appellee's theory. Thus, in a trial on the charge of murder against John Smith, the testimony of William Henry, given in a hearing of the National Labor Relations Board, that Smith was the enemy of the murdered man would be admissible even though Henry were an available witness. 196 F.2d 120, 123.

The Government's failure to make any showing of the unavailability of Miss Vargas-Garcia is the very crux of the

case. In *Barber v. Page*, 390 U.S. 719 (1968), this Court held that the primary object of the Confrontation Clause of the Sixth Amendment was to prevent the use of *ex parte* affidavits in lieu of a personal examination and cross-examination of the witness in which the accused had an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the trier of fact. The Court had reason to use its earlier decision in *Mattox v. United States*, 156 U.S. 237 (1895), where an exception was created on the principle of necessity. There a witness who had testified at an original trial had died prior to the second trial. In *Mattox* necessity was shown, and the prior testimony was admissible. In *Barber*, no necessity was shown nor was good faith effort made to locate the witness, and the transcript of the preliminary hearing was held to be inadmissible.

In more recent cases this Court has dealt with the applicability of the Confrontation Clause to state proceedings. *California v. Green*, 399 U.S. 149 (1970), *Dutton v. Evans*, 400 U.S. 74 (1970). Under either the right of confrontation protected by the Sixth Amendment or under the Court's general supervisory power, this record should not have been admitted without a showing of unavailability of the witness.

C. The Failure to Provide Funds to Secure the Attendance of Two Necessary and Material Witnesses Was a Denial of Due Process Under the Fifth Amendment and a Denial of the Effective Assistance of Counsel Under the Sixth Amendment.

Prior to the trial, the defendant filed a motion to dismiss the indictment asserting, as one of the grounds, the prejudicial delay in the return of the indictment which denied the defendant access to certain material witnesses, Rico and Ortiz, who had been arrested with the defendant, but deported to Mexico prior to their examination by defense

counsel. (App. 11). During the hearing on the motion to suppress, when the INS agents testified as to the search of the defendant's apartment by virtue of the consent given by Ortiz and Rico, defense counsel moved that the testimony concerning consent be struck, or in the alternative, that the defendant be given an opportunity to try and locate these particular witnesses so that they could be brought into court to testify on the issue of consent, for otherwise the defendant's constitutional right of confrontation of the witnesses against him would be violated. (App. 35, 73). The objection to the testimony of the agents was overruled, and the motion for funds to locate the wintesses was denied. (App. 35).

The two prisoners were not nationals or residents of the United States, and, therefore, could not be reached with a subpoena. 28 U.S.C. 1783. However, under the equal protection requirements of the due process clause of the Fifth Amendment (*Bolling v. Sharpe*, 347 U.S. 497; 499 (1954)), the defendant should have been given the opportunity to seek the attendance of these witnesses, especially Ortiz concerning the second entry, as the fair equivalent of compulsory process of witnesses. These witnesses would be necessary to insure adequate cross-examination of the INS agents, for since the INS agents were certainly aware of the absence of these aliens, they knew their testimony would go uncontradicted.

The defendant was arrested on 19 November 1968, and his first court appearance with counsel was 16 December 1968. On 12 December 1968 Ortiz entered a plea of guilty and was given three years probation with a recommendation that he be returned to Mexico. (Record in Court of Appeals 59). If defense counsel had been appointed prior to 12 December 1968, he would have had an opportunity at this "critical stage" of the criminal proceeding to secure the testimony of the essential witnesses. There was no preliminary hearing on appearance before the United States Commissioner (App. 72), and this delay in bringing the defend-

ant before a judicial officer denied him the opportunity to secure testimony of witnesses on the vital aspects concerning the entry of INS agents into his apartment.

This prejudicial delay precluded the effective defense presentation on the issue of the suppression of evidence, and since the trial court denied any opportunity to secure the testimony of these witnesses who might have aided the impecunious defendant, this Court should sustain the reversal of the criminal conviction.

CONCLUSION

For the reasons set forth above, Dimas Campos-Serrano, the respondent, through his attorney requests that the judgment of the Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

John J. Cleary
Federal Defenders of
San Diego, Inc.
Attorney for Respondent

Assisted by:

Patrick Goss,* Law Student
University of Arkansas School
of Law

Dated: July 1971

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*Under a federal grant to the National Legal Aid and Defender Association, Mr. Goss was selected to serve a practical legal internship with the community defender organization for the United States District Court for the Southern District of California. In this capacity he assisted counsel in the preparation of this brief.

SPECIAL APPENDIX TO RESPONDENT'S BRIEF

IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

UNITED STATES OF AMERICA *Plaintiff;* vs. ENRIQUE FERNANDEZ-GONZALES, *Defendant.*	*Findings Of Fact and Conslusions Of Law.* *64 CR 101*

TRANSCRIPT OF PROCEEDINGS
before
HON. MICHAEL L. IGOE
Judge

Everett H. Hughes
Official Court Reporter
United States District Court
United States Courthouse
Chicago, Illinois 60604
WEBSTER 9-2829

This cause coming up for trial before this Court on the indictment charging the defendant with the violation of Section 1546, Title 18, of the United States Code, and the defendant having waived trial by jury and having signed a jury waiver which was thereupon approved, and the evidence in this cause having thereupon been submitted to the Court on an agreed statement of the facts and both sides thereupon resting, comes the defendant and presents his motion to find him not guilty on the ground that the indictment fails to charge any offense within the purview of said Section 1546 and that the evidence fails to establish beyond a reasonable doubt the guilt of the defendant of any offense cognizable by said Section 1546, Title 18, of the United States Code.

and the Court having heard argument in open court by the respective counsel for both sides, and now being fully advised in the premises, upon due consideration thereof, Finds:

FINDING OF FACTS

The defendant is a native and citizen of Mexico. He entered the United States at Chicago, Illinois, on or about November 14, 1962, as a non-immigrant visitor for pleasure, authorized to remain in the United States until February 14, 1963. He has remained without authority since the latter date. In the proceedings before a special inquiry officer of the Immigration and Naturalization Service, at Chicago, Illinois, on an Order to Show Cause, the defendant conceded that he was subject to deportation on the charge contained in the Order to Show Cause, to wit: Of having entered as a non-immigrant and remained beyond the date authorized by his non-immigrant visa. The defendant's application for voluntary departure from the United States at his own expense in lieu of deportation was denied by the Immigration Service. Neither the defendant's deportation nor the denial of his application for voluntary departure in lieu of deportation is in any way involved in the instant proceedings.

In December of 1962 the defendant, on the advice of a boy working with him in a meat market in Chicago where he was employed, wrote to one Oscar Rodriguez in Nuevo Laredo, Mexico, asking him what it would cost to fix his papers so that he could stay in the United States permanently and, after receiving a reply, sent to said Oscar Rodriguez the sum of One Hundred ($100.00) Dollars, together with two photographs of himself and his passport. Some twelve days later the defendant's passport was returned to him with the alien registration receipt card bearing No. A8-536-766 in the name of Francisco Ochoa Cazares and with defendant's photograph affixed to the back. The defendant wrote back to Oscar Rodriguez that he could not use this card because it was not in his name and did not have his correct birth date, but the letter was returned to him and he never heard from Oscar Rodriguez again.

Following receipt of the said alien registration card, the defendant obtained a social security card in the name of Francisco Ochoa Cazares and exhibited the alien registration card and the social security card to his employer, Acme Specialties Corporation.

It is this alien registration card which is the basis for the indictment of the defendant for violating Section 1546, Title 18, United States Code. The indictment consists of three counts. In the first count the defendant is charged in effect with wilfully and knowingly having the offending alien registration card in his possession, in violation of Section 1546, Title 18, United States Code. In the second count, the defendant is charged with unlawfully using a fraudulent alien registration card by presenting same to Acme Specialties Corporation, River Grove, Illinois, to obtain employment, knowing same to have been falsely altered, in violation of Section 1546, Title 18, United States Code. In the third count, the defendant is charged in effect with having obtained, received and accepted the offending alien registration card, knowing same to have been fraudulently altered for the purpose of falsely claiming to be a non-quota immigrant when he knew that as a native of Mexico he was a quota immigrant and as such not entitled to remain in the United States beyond the period allowed by law on a visitor status, all in violation of Section 1546, Title 18, United States Code.

CONCLUSIONS OF LAW

Section 1546, Title 18, United States Code, does not appear, upon a careful reading, to deal with alien registration receipt cards. This section, as amended June 27, 1952, is entitled "Fraud and misuse of visas, permits, and other entry documents", and the first paragraph thereof (the only one which could possibly apply to the offense charged in the indictment) reads as follows:

"S 1546. Fraud and misuse of visas, permits, and other entry documents.

Whoever, knowingly forges, counterfeits, alters, or falsely makes any immigrant or non-immigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained: . . .

* * *
* * *
* * *

Shall be fined not more than $2,000 or imprisoned not more than five years, or both. As amended June 27, 1952."

An alien registration receipt card is not a visa, permit, or other document required for entry into the United States. It is a document which is issued to an alien after his entry into the United States but never before his entry.

The registration of aliens and the issuance of alien registration cards is governed by Sections 1301, et seq., of Title 8 of United States Code, the Immigration and Naturalization Act of 1952. Section 1302 of said Title 8 provides, so far as is pertinent, as follows:

"S 1302. Registration of Aliens.

(a) It shall be the duty of every alien now or hereafter in the United States, who, (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under Section 1201, (b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

Section 1304 of the Immigration and Naturalization Act of 1952, in paragraph (d) thereof, provides as follows:

> "Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General."

Section 1306 of said Title 8 of the United States Code, in sub-paragraphs (a), (b), (c), and (d), provides penalties for the violation of the Alien Registration Act and imposes severe penalties for the alteration or forgery of an alien registration receipt card.

It will be noted that the Immigration and Naturalization Act, of which the alien registration provisions are a part, and Section 1546, as amended, of Title 18, United States Code, were adopted by the Congress of the United States on the same day, to wit: June 27, 1952. There is no reason to believe, then, that Congress intended Section 1546 of Title 18, dealing with visas, permits, and other entry documents, to cover alien registration cards as well, since it adopted at the same time separate and express provisions to deal with such alien registration cards. It is clear that an alien registration card is issued to an alien after he has entered the United States and is merely an acknowledgment or certification of his having entered.

It follows as a matter of law that an offense with respect to an alien registration card cannot constitute a violation of Section 1546 of Title 18, United States Code. Every federal prosecution must be sustained by statutory authority. The instant prosecution. bottomed by the Government on the inapplicable provisions of Section 1546 of Title 18, must there fail.

Having reached this conclusion, the other points made by the defendant in support of his motion to find him not guilty need not be considered.

It Is Therefore Ordered that defendant's motion to find him not guilty, made after both sides have rested, by and the same is hereby allowed.

It Is Further Ordered that the defendant be and he is hereby found not guilty of the charges made against him in all three counts of the indictment.

The defendant is accordingly discharged.

Enter:

/s/ M. L. Igoe
Judge.